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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted] 2

NEW WORLD LIFE INSURANCE COMPANY, a Corporation,
Petitioner,

v.

THE UNITED STATES.

On Petition for a Writ of Certiorari to the United States Court of Claims.

PETITIONER'S REPLY BRIEF.

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IN THE

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Petitioner,

v.

THE UNITED STATES.

On Petition for a Writ of Certiorari to the United States Court of Claims.

PETITIONER'S REPLY BRIEF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

INVESTMENT EXPENSES.

Respondent states the question to be whether a life insurance company may for Federal income tax purposes allocate to and deduct as investment expenses, without limitation, a portion of the salaries paid to its officers for services performed generally in all departments of its business. (Resp. Brief 2.)

Petitioner respectfully submits that the question is whether a portion of total salaries paid by a life insurance company to its officers and cashiers for part-time services rendered by them in the investment branch of its business and charged as investment expenses on its books may be deducted as investment expenses. (Pet. 8; R. 24, 25.)

No question of assignment of general expenses to investment expenses is involved.

Petitioner does not claim a deduction *without limitation* of a portion of salaries paid *for services performed generally*. The deduction claimed is for a portion of total salaries paid for part-time services *actually performed in the investment department* and charged on the books as investment expenses. Petitioner contends that that portion of total salaries paid for part-time services actually performed in the investment department are actual investment expenses and not an assignment of general expenses to investment expenses. (R. 24, 25.)

Respondent's statement that the decision of the Court below is not in conflict with any decision of any Federal Court of Appeals is true (Resp. Br. 7); but the decision of the Court below is directly in conflict with its own decision in *Sun Life Ins. Co.* v. *U. S.*, 81 Ct. Cls. 892, on the identical issue.

II.

RESERVE FUNDS.

The question as stated by the respondent is broad enough to cover separate policies of health and accident insurance. (Resp. Brief 2.) The question pertains solely to reserve funds for health and accident insurance, issued in combined* policies of life, health and accident insurance. (R. 18.)

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*A life insurance company is defined in Sec. 201 (a) of the Revenue Act of 1928 as

"an insurance company engaged in the business of issuing life insurance and annuity contracts (including contracts of combined life, health and accident insurance) the reserve funds of which held for the fulfillment of such contracts comprise more than 50 percentum of its total reserve funds."

Respondent argues that the decision of the Court below follows the decisions of this Court in *Helvering* v. *Illinois Life Ins. Co.*, 299 U. S. 88, and *Helvering* v. *Inter-Mountain Life Ins. Co.*, 294 U. S. 686, notwithstanding the fact that this Court in the former case was considering survivorship fund reserves, and in the latter, coupon reserves,—no question of disability fund reserves being involved in either case. Although this Court in the *Inter-Mountain Life* case used the broad language that

> "in life insurance, the reserve means the amount accumulated by the company out of premium payments which is attributable to and represents the value of the life insurance elements of the policy contracts";

in the *Illinois Life* case this Court specifically stated that its decision in the *Inter-Mountain Life* case

> "rests upon the ground that the reserves in respect of the coupon liability were not essentially *insurance reserves* which alone constitute the base on which deduction is computed." (Italics ours.)

The Court below did not hold, nor does the Government contend in its brief in opposition, that the disability reserves involved in this suit are not "insurance reserves." Clearly, the decision of the Court below cannot be deemed to be in accordance with the decisions of this Court in the two foregoing cases, as respondent argues, when the questions involved in those cases were entirely different from the question involved herein.

Respondent argues that *Helvering* v. *Reynolds Tobacco Company*, 306 U. S. 110, is not controlling on the question of whether the Commissioner could in 1935 amend his Regulations, which had been in force since 1921, and apply them retroactively to 1929. In that case this Court held that Section 22 (a) of the Revenue Act of 1928 defining gross income was "so general in its terms as to render an interpretative regulation appropriate"; and that in such a sit-

uation the Commissioner could not amend his Regulations and apply them retroactively.

Section 203 (a) (2) of the Revenue Act of 1928 is equally general in its nature as Section 22 (a), if not, in fact, more general, and likewise, renders an interpretative regulation appropriate, inasmuch as it authorizes a deduction of

> "an amount equal to 4 per centum of the mean of reserve funds required by law and held at the beginning and end of the taxable year * * *"

without any statutory definition or qualification whatsoever of the term "reserve funds."

Other cases cited by the respondent are not in point. They do not involve the question of whether the Commissioner can amend his regulations and apply them retroactively, where the Statute is so general as to render an interpretative regulation appropriate, as here.

Manhattan Company v. *Com.*, 297 U. S. 129, 134, 135, holds that the Commissioner cannot amend an original regulation which is "contrary to the intent of the statute," and which is "both inconsistent with the statute and unreasonable," inasmuch as such original regulation is a "mere nullity"; and there is no question, therefore, of retroactivity.

Morrissey v. *Com.*, 296 U. S. 344, 355, holds that the Commissioner could amend his regulations to accord with the decision of this Court in *Hect* v. *Malley*, 265 U. S. 144.

Koshland v. *Helvering*, 298 U. S. 441, 446, 447, holds that where a statute is unambiguous and its directions specific, there is no power in the first instance to amend it by regulation.

Bittle v. *Com.*, 302 U. S. 573, 582, holds that a regulation construing a *foreign law* does not have the force of law by virtue of subsequent reenactments by the Congress.

III.

BOTH ISSUES ARE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The question involving investment expenses is of importance to every life insurance company in the United States; and the question involving disability reserve funds is of equal importance, as "Best's Life Insurance Reports" for the year ended 1938 discloses that there are at least two hundred and ninety life insurance companies writing disability insurance. Furthermore, a large number of these companies are mutual companies in which the many millions of policyholders are the ultimate parties in interest, inasmuch as the cost of their insurance will be affected by the final decision in this case.

Counsel has been advised that a large number of cases involving the disability reserve fund question are pending in the Treasury Department awaiting final adjudication of this question. Furthermore, the following cases are pending in the Courts and in the Board of Tax Appeals in which the disability reserve fund issue is involved:

1. In the United States Circuit Courts of Appeals:

Monarch Life Insurance Company (First Circuit), Docket Nos. 3470, 3475, 38 B. T. A. 95, which is set down for argument in January, 1940;

Pan-American Life Insurance Company (Fifth Circuit), Docket No. 9175, 38 B. T. A. 188, which probably will be set down for argument not later than February or March, 1940;

Oregon Mutual Life Insurance Company (Ninth Circuit), Docket No. 9318, B. T. A. Memo. Opinion, Nos. 85182, 88299, which probably will be set down for argument early during 1940.

2. In the COURT OF CLAIMS:

Amicable Life Insurance Company, No. 44588;
New World Life Insurance Company, No. 44599.

3. In the FEDERAL DISTRICT COURT OF MASSACHUSETTS:

Paul Revere Life Insurance Company, No. 307.

4. In the BOARD OF TAX APPEALS:

Equitable Life Assurance Society of the United States, Nos. 89294, 93805;
Great Southern Life Insurance Company, No. 95384;
Federal Life Insurance Company, No. 99419;
Massachusetts Mutual Life Insurance Company No. 98856;
New World Life Insurance Company, No. 98355;
United Life & Accident Insurance Company, No. 85321;
United Life & Accident Insurance Company, No. 93815.

On the question of investment expenses the following cases are pending:

1. In the UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT:

Volunteer State Life Insurance Company, No. 35 B. T. A. 491, which was argued on October 10, 1939.

2. In the FEDERAL DISTRICT COURT OF MASSACHUSETTS:

Boston Mutual Life Insurance Company v. *White*, Nos. 5332, 5333, 5334.

3. In the COURT OF CLAIMS:

Amicable Life Insurance Company, No. 44599;
New World Life Insurance Company, No. 44588.

4. In the Board of Tax Appeals:

New World Life Insurance Company, No. 98355;
United Life & Accident Insurance Company, No. 85321;
United Life & Accident Insurance Company, No. 93815.

In view of the large number of cases now pending in the various Courts and the Board of Tax Appeals, it is practically a certainty that both questions presented herein will come before this Court during the coming year. It is respectfully submitted that it would be for the best interest of all life insurance companies and the Government, if this Court would grant certiorari in this case and definitely settle the questions at this time.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari herein should be granted.

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